IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5713 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMESH M PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5713 of 1991
MR KETAN A DAVE, Advocate for the Petitioner
MR.R.C.KODEKAR, ASST. GOVERNMENT PLEADER for the Respondent No. 1 - State of Gujarat
MR JB PARDIWALA, Advocate for the Respondent No. 2 - High Court of Gujarat

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CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 15/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The petitioner, who is an advocate, has challenged the constitutionality of the provisions of the Gujarat Judicial Service Recruitment Rules, 1961 on the ground that they are violative of Article 16(4) of the Constitution of India as they do not provide for reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes in the judicial services.

1.1 There were other challenges raised in the petition as to the fixing of the minimum income limit for the purpose of considering the candidates, not inviting applications by advertisement and relying upon the recommendations made by the Principal Judicial Officers, including the District Judges, and in respect of the candidate (Shri A.A.Shaikh), who was not included in the select list. But, at the outset, the learned counsel for the petitioner made it clear to us that the petition is being confined only to the challenge against the impugned recruitment rules on the question of reservation in subordinate judicial service as warranted under Article 335 of the Constitution of India read with Article 16(4).

2. Since the petition is now confined only to the question regarding reservation policy in judicial service and the challenge against the validity of the impugned recruitment rules, we will refer to the pleadings relevant to the controversy centering around that issue.

2.1 It has been contended in the petition that, in respect of the direct recruitment which was being made to the post of Small Causes Judges and Civil Judges (Senior Division), the impugned rules did not provide for any reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes. According to the petitioner, in the High Court, there was only 3% representation of the Scheduled Castes and "nil" representation for the Scheduled Tribes. Under Article 16(4) of the Constitution, adequate participation of backward class of citizens in the management of the society was contemplated at all levels and judicial administration was not beyond the purview of that provision. Moreover, the Directive Principle enunciated under Article 46 requires the State to promote with special care the educational and economic interests of the weaker sections

of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all forms of exploitation. It was also contended that the impugned rules violated the provisions contained in Article 335 of the Constitution which directed the state to take into consideration the claims of the members of the Scheduled Castes and the Scheduled Tribes consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or a State. According to the petitioner, the impugned recruitment rules operated to perpetuate inequality inasmuch as they did not provide for any consideration for the representation of the backward classes. It was also contended that no reservation or preference for Scheduled Castes, Scheduled Tribes or Other Backward Class candidates was, in fact, considered by the Selection Committee, which had undertaken the process of appointment by direct recruitment to some posts of Civil Judges (Senior Division) and Judges of Small Causes Court, Ahmedabad.

3. Rule 4(1)(ii), inter alia, provided for method of appointment to a post in the cadre of Civil Judges (Senior Division) by direct selection, which belongs to Class I of the Junior Branch. Rule 4(2)(ii), inter alia, made a provision for the post of Judge of the Small Causes Court, Ahmedabad. Under sub-rule (4) of Rule 4, it was provided that where an appointment to any post is to be made by direct selection, it shall be made from amongst the candidates who are not more than 45 years of age (except that candidates belonging to communities recognized as Backward by Government for purposes of recruitment may not be more than 48 years). Admittedly, there is no provision in the impugned rules having any bearing on reservation of vacancies or posts in judicial services covered by them.

4. The learned counsel appearing for the petitioner submitted that the power under Articles 16(4), 46 and 35 of the Constitution was coupled with duty and the respondent No.2 - High Court was required to strike a balance between the claims of backward classes and the consideration of efficiency in administration. He submitted that the problem of adequate representation of backward class of citizens was required to be fairly and objectively considered under Article 16(4) of the Constitution and considering the benefit of reservation cannot be denied to backward classes merely on the basis that there was likelihood of the efficiency of administration being affected thereby. He further argued

that the respondent No.2 was required to undertake an exercise to find out under Article 16(4) whether there were backward classes and whether such classes were adequately represented in service. No such exercise was undertaken by the respondent No.2. He submitted that since the impugned rules did not take care of the reservation aspect, the important provision of Article 16(4) read with Article 335 of the Constitution, which provided for an affirmative action to ameliorate the lot of backward classes, was ignored. He further submitted that there was no separate provision made for reservation in the context of the recruitments under the impugned rules. The respondent No.2 had, therefore, failed in its duty in not considering the aspect of reservation in judicial services and not making any provision for reservation for the SC / ST / OBC candidates in the recruitment rules or other rules or orders in connection with the judicial services covered under the recruitment rules.

4.1 In support of his contentions, the learned counsel for the petitioner placed reliance on the following decisions :

[a] Reliance was placed on the observations made in paragraph 51 of the decision of the Supreme Court in Indra Sawhney v. Union of India reported in AIR 2000 SC 498, at page 515, to the effect that the qualifications, standard and talent necessary for Backward Classes cannot be relaxed or reduced to a level which may affect the efficiency of administration, in order to submit that such standards which are fixed would take care of the level of efficiency of administration and therefore, once a backward class candidate has crossed that standard, there would be no question of the efficiency of administration being affected if benefit of the reservation policy is given to such candidate.

[b] The decision of the Supreme Court in Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, reported in AIR 1981 SC 298, was cited for the proposition reflected in paragraph 21 of the judgment that, Article 16 which guarantees equal opportunity for all citizens in matters of State Service inherently implies equalization as a process towards equality, but also hastens to harmonize the realistic need to

jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Article 16(4) for this specific purpose. Article 16(4) is not a jarring note but is auxiliary to fair fulfillment of Article 16(1). The prescription of Article 16(1) need, in the living conditions of India, the concrete sanction of Article 16(4) show that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung.

[c] Reliance was placed on the decision of the Supreme Court in Indra Sawhney v. Union of India, reported in 1992 Supp. (3) SCC 217 [AIR 1993 SC 477] for pointing out that, in paragraph 836 of the judgement, it has been pointed out that the mandate of Article 335 is to take the claims of members of Scheduled Castes and Scheduled Tribes into consideration consistent with the maintenance of efficiency of administration, and that, it would be misreading of the Article to say that the mandate is maintenance of efficiency of administration. The learned counsel also pointed out that it was held therein that it cannot be ignored that the very idea of reservation implies selection of a less meritorious person. The Supreme court held: "At the same time, we recognize that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed".

5. The respondent No.2 - High Court has filed an affidavit-in-reply contesting the petition. Since the only issue regarding reservation policy for judicial posts was argued and other questions raised in the petition were expressly given up, we would refer to the averments which have bearing on that issue from the reply to ascertain the stand of the respondent No.2. According to the respondent No.2, the provisions of the impugned rules are just, legal and proper and the criterion adopted by the administrative side of the High Court in recommending the candidates for appointment to the posts of judicial services is also just and proper. It is stated that, for recommending candidates for judicial posts, a Special Committee consisting of Hon'ble Judges of the Gujarat High Court is constituted and such Committee prepares list of suitable candidates considering their merits and then the High Court makes recommendation to the government for appointments to the

judicial posts. In paragraph 5 of the reply, it is stated that there is no procedure prescribed with regard to the process of selection in the recruitment rules and therefore, it is open to the respondents authorities to adopt any suitable, just and proper method for selecting candidates having the requisite qualifications as per the Recruitment Rules for appointment to the judicial posts covered under the rules. It is stated that there is no provision with regard to any reservation for Scheduled castes and Scheduled Tribes candidates in the Recruitment Rules and "looking to the duties which are performed by Judicial Officers, it is not thought necessary to have any reservation in the Judicial posts". In paragraph 6 of the reply, it is stated that Article 16(4) of the Constitution of India is to be read alongwith Article 335 which provides that efficiency in the administration should also be maintained while considering the question with regard to reservation for Scheduled Castes and Scheduled Tribes candidates. It is then stated that :

> "It is further submitted that applying reservation policy might become harmful to judiciary and therefore, policy with regard to reservation for Scheduled Castes and Scheduled Tribes candidates etc. has not been followed, specifically when Article 335 of the Constitution of India requires maintenance of efficiency in administration. It is submitted that there is no constitutional compulsion or obligation with regard to having reservation policy in the appointment to the judicial posts."

Again in paragraph 8 of the reply, it is stated that there is no obligation on the part of the High Court to recommend names of candidates belonging to Scheduled Castes and Scheduled Tribes or other persons belonging to backward classes, and that the provision of Article 335 of the Constitution of India is also to be taken into account while deciding whether posts should be reserved for Scheduled Castes and Scheduled Tribes candidates.

5.1 Apart from the clear stand taken in the reply, which was adhered to throughout the hearing, that the High Court was of the view that the policy with regard to reservation for Scheduled Castes and Scheduled Tribes candidates has not been followed, because, applying reservation policy might become harmful to judiciary as the posts in judiciary require high degree of efficiency and responsibility, the learned counsel for the respondent No.2 has placed on record certain documents

showing the orders made from time to time which reflected the stand of the High Court on the question of reservation in judicial posts. A copy of the application under which the documents were produced was duly served on the learned counsel for the petitioner alongwith the copies of the documents.

5.1.1 It appears from these documents that a decision was taken by the Chamber Meeting held on 1-2-1977 in respect of the direct recruitment to judicial posts to adopt the following resolution passed on the question at the Chief Justices' Conference held in November 1976 :

> "Posts should be reserved for Scheduled Castes and Scheduled Tribes in accordance with relevant rules in the State. However, if suitable candidates are not found, one more chance should be given and if even then suitable candidates are not found, the posts may be filled up by other suitable candidates."

5.1.2 As regards the posts to be filled in by promotion, it was decided by the High Court by its decision taken at the Chamber Meeting held on 13th September 1977 to accept the report of the Sub-Committee, dated 8th April 1977, inter alia, stating that :

> "efficiency being of paramount importance, reservation is likely to impair efficiency and therefore, part of the Government Resolution making reservation of the posts for Scheduled Castes and Scheduled Tribes in the posts to be filled up by promotion in Class I i.e. High Judicial Service in Judicial Department should not be implemented."

5.1.3 It appears from the record that, by letter written by the Hon'ble Chief Justice on 2-1-1977, it was informed to H.E. the Governor that the High Court had no objection for reservation being made in accordance with the aforesaid resolution passed at the Chief Justices' Conference held in 1976.

5.1.4 It appears from the note placed on record by the respondent No.2 - High Court that, on receipt of the Government of India letter dated 18th August 2001 regarding the second report of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes, the full Court meeting held on 25th April 2001 decided as

under :

> "It was decided to re-iterate the earlier stand of the High Court in the matter. The High Court is not in favour of making reservation in Class-I and Class-II of Judicial Service, more so in view of the Supreme Court decision reported in State of Bihar vs. Bal Mukund Sah (2000)4 SCC 640." (emphasis added).

5.1.5 Again the Full Court Meeting had considered the issue on 1-2-2003 and took the following decision :

> "It was resolved to re-iterate the earlier stand in the matter of Reservation for Scheduled Castes and Scheduled Tribes in Judiciary as decided earlier at various Chamber Meetings to the effect that, there is no scope for reservation at the promotional stage in any cadre of the Judicial Service and also at the Recruitment stage in Class-I posts, except the reservation now available, at the recruitment stage of the Class-II cadre of Civil Judges (Junior Division)." (emphasis supplied).

5.1.6 It is also brought on record that the Selection Committee appointed at the Chamber Meeting held on 2-8-2003 to look after the further process of recruitment to the posts of Civil Judges (Junior Division) subsequent to the written test met on 11th November 2003 to consider the question as to who should be called for Viva Voce Test, and in its decision dated November 12, 2003, the Selection Committee observed :

> "The Supreme court in its judgement in the matter of State of Bihar v. Bal Mukund Sah reported in (2000)4 SCC 640 has held that it is not necessary to have reservation while making recruitment to the judicial posts. Therefore, the decision of the Examination Committee dated 30-6-2003 laying down that those candidates belonging to SC-ST who obtain 50% or more marks in the Written Test should be considered as eligible for Viva Voce Examination need not be adhered to. ....." (emphasis added).

6. The learned counsel for the respondent No.2 High Court submitted that there was no constitutional

obligation under Article 16(4) to provide for reservation. It was submitted that the provision of Article 16(4) was required to be read in the context of Article 335, which clearly provided that the claims of members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in making of appointments to services and posts in connection with the affairs of the Union or of a State. It was argued that Article 16(4) was only an enabling provision and not a fundamental right and therefore, the challenge against the impugned rules on the ground that they violated Article 16(4) was misconceived. He submitted that Article 16(4) only confers discretion on the High Court, with regard to the appointments made by the High Court in exercise of its powers under Articles 233, 234 and 235 of the Constitution. It was submitted that, in making a provision for reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes, the maintenance of efficiency of administration is a matter of paramount importance under Article 335. He submitted that the provision regarding efficiency of administration under Article 335 was of a mandatory nature. The learned counsel contended that the High Court, being the authority concerned, with regard to recruitment to judicial services, was in the best position to know whether any representation should be given in judicial services in the context of efficiency of administration. It was submitted that even if the High Court had accepted the policy of reservation for judicial posts, as reflected in the resolution made on 1-2-1977, if, in the final analysis, the High Court found that the effect of reservation cannot be given as that would hamper the efficiency of administration, then the High Court was justified in not making appointments as per the quota reserved. The learned counsel placed reliance on the averments made in the affidavit-in-reply filed on behalf of the High Court and submitted that, as stated therein, the High Court felt that applying reservation policy might become harmful to judiciary and therefore, policy with regard to reservation for Scheduled Castes and Scheduled Tribes candidates has not been followed, specifically when Article 335 of the Constitution of India requires maintenance of efficiency and administration. He submitted that the stand taken in the affidavit-in-reply has been taken after due deliberations by the High Court, and that even though, on record, there has been a Chamber Meeting resolution of 1-2-1977, as per which, the reservation policy under the rules of the State was adopted for judicial posts, in reality, while making appointment to the judicial posts, no such policy

has been followed. He, however, submitted that there has been adequate representation of Scheduled Castes candidates in the cadre of Civil Judges (Junior Division) and the backlog was only in the category of Scheduled Tribes. The learned counsel also argued that a Judge, whose sacrosanct duty is to dispense justice, is expected to have a high level of intelligence and some expertise in the field of law and therefore, the High Court was justified in not implementing reservation policy in the judicial posts. It was submitted that the matter whether efficiency would be affected in the judicial administration if reservation is made, was a question within the exclusive domain of the Respondent No.2 - High Court. It was, however, stated that while publishing advertisement for the posts of Civil Judges (Junior Division) in the Gujarat State Judicial Services, Class II, it is always made clear that if no suitable candidates from SC / ST / SEBC are available, the post reserved for them will be filled from general category.

6.1 The learned counsel placed reliance on the following decisions in support of his contentions :

[a] Reliance was placed on the decision of the Supreme Court in State of Bihar v. Bal Mukund Sah, reported in (2000)4 SCC 640 : [AIR 2000 SC 1296] in support of the proposition that the maintenance of efficiency of judicial administration was entirely within the control and jurisdiction of the High Court as laid down by Article 235, and that, the High Court would have an expertise to suggest that, for maintenance of efficiency of administration in the judicial services controlled by it, reservation may not be required at all. It was submitted that, from paragraph 38 of the judgement of the Supreme Court, it was clear that there can be instances where the High Court would be of the opinion that reservation was not required at all for the judicial posts under its control. Referring to paragraphs 41, 48, 58, 119 of the said decision, the learned counsel submitted that the High Court alone was in a position to know as to whether, and if so, to what extent the reservation policy should be adopted with regard to the judicial posts.

[b] The decision of the Supreme Court in Ajit Singh v. The State of Punjab, reported in AIR 1999 SC 3471, was cited for the proposition that Article

16(4) and 16(4A) do not guarantee any fundamental right to reservation. The language of these Articles was in the nature of an enabling provision and they did not confer any fundamental rights nor do they impose any constitutional duties, but were only in the nature of an enabling provision vesting discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted.

[c] The decision of the Supreme Court in N.T.R. University of Health Sciences v. Babu Rajendra Prasad, reported in AIR 2003 SC 1947, was cited for the proposition that, how and in what manner the reservations should be made was a matter of policy decision of the State, which would normally not be open to challenge subject to its passing the test of reasonableness, as also the requirements of the Presidential Order made in terms of Article 371-D of the Constitution of India.

[d] The decision of the Supreme Court in General Manager, Southern Railway v. Rangachari, reported in AIR 1962 SC 36, was cited for the proposition that the condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services.

[e] The decision of the Supreme Court in State Bank of India Scheduled Caste / Tribe Employees Welfare Association v. State Bank of India, reported in AIR 1996 SC 1838, was cited for the proposition that Article 16(4) did not confer any right and there is no constitutional duty imposed on the Government to make such a reservation. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation. (paragraph 12).

[f] The decision of the Supreme Court in C.A. Rajendra v. Union of India, reported in AIR 1968 SC 507, was cited for the same proposition that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the

stage of promotion, and that, Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented.

7. The only issue around which the controversy has centered is of reservation for the backward class of citizens in judicial posts. The stand taken by the High Court in its affidavit-in-reply is that, applying reservation policy to the posts in judiciary, which require "high degree of efficiency and responsibility", might become "harmful to judiciary" and therefore, the policy with regard to the reservation of Scheduled Castes and Scheduled Tribes candidates has not been followed, "specifically when Article 335 of the Constitution of India requires maintenance of efficiency in administration". According to the learned counsel for the High Court, though a resolution was passed at the Chamber Meeting held on 1-2-1977, adopting the resolution passed at the Chief Justices' Conference held in November 1976, stating that posts should be reserved for Scheduled castes and Scheduled Tribes candidates in accordance with the relevant rules in the State, in reality, it has not been implemented. He was fair enough to point out that even the Selection Committee appointed at the Chamber Meeting held on 2-8-2003 to look after further process of recruitment to the post of Civil Judge (Junior Division) and Judicial Magistrate First Class had taken the view that the Supreme Court in its judgement in State of Bihar v. Bal Mukund Sah has held that, it is not necessary to have reservation while making recruitment to the judicial posts. It is made clear to us that, according to the High Court, though on paper it was decided to have reservation policy for direct recruitment in the judicial posts, as reflected in the resolution made at the Chief Justices' Conference in November 1976, which was adopted, that reservation is not actually done on the ground that it would adversely affect the efficiency of judicial administration.

8. The stand taken by the High Court on the issue of reservation for Scheduled castes and Scheduled Tribes in the direct recruitment of judicial posts at the lowest rung of judiciary flies in the face of the constitutional provisions and its own decision taken as far back as in 1977 to reserve judicial posts for Scheduled castes and Scheduled Tribes in accordance with the relevant rules in the State and to the effect that if suitable candidates are not found, one more chance should be given and if

even then suitable Scheduled castes and Scheduled Tribes candidates are not found, the posts may be filled up by other suitable candidates, which stand was maintained, as reflected in the Resolution of the Full Court passed on 1-2-2003, when the Full Court reiterated its earlier stand in the matter of reservation by stating that there was no scope for reservation at the promotional stage in Class-I posts, "except reservation now available at the recruitment stage of the Class-II cadre of Civil Judges (Junior Division)". We are told by the learned counsel appearing for the High Court that despite this stand on paper and though backlog of the Scheduled castes and Scheduled Tribes is being shown in the advertisements, in practice, the reservation policy is not observed even for direct recruitment to these lowest judicial posts.

9. Article 16(4) of the Constitution enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State. This provision was designed clearly to make the right to equality of opportunity in matters relating to employment or appointment to any office under the State guaranteed under Article 16(1) to be more meaningful. Article 46 of the Constitution enjoins a duty on the State to promote with special care the education and economic interests of the weaker sections of the people and in particular, of the Scheduled castes and Scheduled Tribes, and to protect them from social injustice and all forms of exploitation. Article 335, which falls in Part XVI, containing special provisions relating to certain classes, provides that the claims of the members of the Scheduled castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in making the appointments to services and posts in connection with the affairs of the Union or of a State.

9.1 The High Court, being "State" within the meaning of Article 12 for the purpose of Parts III and IV of the Constitution, is empowered to make special provisions for the reservation of appointments or posts in favour of any backward class of citizens which, in its opinion, is not adequately represented in judicial services. Even in the matters of promotion, there is now a similar provision under Article 16(4A) read with the proviso to Article 335 of the Constitution. The Directive Principle enshrined under Article 46, which is fundamental in the governance of the country though not enforceable, enjoins a duty on the State (as defined under Article 12 which would also

include the High Court) to promote with special care the education and economic interests of the Scheduled castes and Scheduled Tribes and to protect them from social injustice. The State is under a duty to apply these principles in making laws and the Courts being under a constitutional oath to uphold the Constitution and the laws cannot remain oblivious of the purposes underlying the constitutional provisions devised to ameliorate the lot of the Scheduled castes and Scheduled Tribes under Articles 16(4), 46 and 335 of the Constitution of India. It is in this context that the following observations in the decision of the Supreme Court in State of Bihar v. Bal Mukund Sah (supra) assume great significance:

> "However, so far as the question of exercising that enabling power under Article 16(4) for laying down an appropriate scheme of reservation goes, as seen earlier, we cannot be oblivious of the fact that the High Court, being the high constitutional functionary, would also be alive to its social obligations and the constitutional guidelines for having a scheme of reservation to ameliorate the lot of the deprived reserved categories like the SC, ST and Other Backward Classes." (Paragraph 38). (emphasis added).

> "The concept of social justice underlying the scheme of reservation under Article 16(4) read with Article 335 cannot be said to be one which the High Court would necessarily ignore being a responsible constitutional functionary." (paragraph 58). (emphasis added).

9.2 Thus, far from stating that "it is not necessary to have reservation while making recruitment to the judicial posts", as assumed by the Selection Committee in their decision dated November 12, 2003, (a copy of which has been placed on record to show that, in actual practice, the policy of reservation is not being followed at present for judicial posts), the Supreme Court, in Bal Mukund Sah's case (supra) expected the High Court as high constitutional functionary to be "alive to its social obligation and the constitutional guidelines to have the scheme of reservation" and not to ignore the concept of social justice underlying the scheme of reservation under Article 16(4) read with Article 333.

10. It cannot be disputed that social composition of judiciary is of crucial importance in the administration of justice in any country. The decisions rendered by the

Courts on the economic and social aspects would, to a large extent, depend upon the economic and social outlook of those who administer justice. There is no justification for an a priori approach that social backwardness pre-supposes lack of merit and efficiency, even when the candidate meets the minimum qualifying standards set up to safeguard the efficiency of administration. When minimum standards are set up for selecting the candidates they usually take care or ought to take care of the efficiency aspect, because, even a general category candidate who satisfies only such minimum standards of eligibility criteria for selection, can be appointed in the absence of candidates having higher comparative merit than him. When the Scheduled Castes and Scheduled Tribes have a dismal representation in judiciary which is not omitted from the ambit of the reservation policy underlying the constitutional provisions, it should be a matter of grave concern for the High Court prompting it to frame its own rules or scheme providing for the reservation of appointments or posts in accordance with the provisions of Article 16(4) read with Article 335 of the Constitution.

11. It will be noticed from the material placed on record, which was gathered by the High Court in 1979, that most of the other High Courts do have provisions regarding reservation for the Scheduled Castes and Scheduled Tribes in the judicial services. From the following material gathered by the High Court and placed on record before us, it is clear that the reservation policy has received due attention and is being implemented in the context of judicial posts by several High Courts :

[a] High Court of Judicature at Allahabad ::

Rule 7 of the U.P. Higher Judicial Service Rules, 1975, provides that reservation for Scheduled Castes / Scheduled Tribes shall be made at the time of recruitment to service. Recruitment to Munsif Magistrates (Class II Judicial Posts), is made in accordance with the U.P. Nyayik Sewa Rules, 1951, and Rule 7 of these Rules makes provision for reservation of Scheduled Castes / Scheduled Tribes at the time of initial recruitment, but there is no provision in the Rules for reservation at the time of promotion of Munsif Magistrates as Civil Judges (Class I posts).

[Letter dated 7th August 1979 of the Registrar, High Court of Judicature at Allahabad].

[b] High Court of Bombay ::

The orders issued by the Government of Maharashtra, in their resolution, General Administration Department, No. BCC-1064-III-J dated 9th April 1965, wherein a provision has been made for reservation of posts for certain sections of Backward Classes (including Scheduled Castes and Scheduled Tribes) at the stage of recruitment in Government service, are made applicable to the judicial posts, to which recruitment is made through the Maharashtra Public Service Commission as under :

"(1) 50% posts of Metropolitan Magistrates, Bombay.

(2) 50% posts of Small Cause Court Judges, Bombay, and

(3) All posts of Civil Judges, Junior Division and Judicial Magistrates, First Class.

In addition to the posts mentioned above, 50% posts of District Judges are filled in by direct recruitment by the High Court. However, before the advertisement inviting applications for such posts is issued by the High Court, Government gives instructions as to how many of these posts should be reserved for the Backward Classes having regard to the total number of posts advertised and to be filled in. But it is made clear in the advertisement itself that the posts are reserved for such candidates, if available, implying thereby that they are reserved for them only if found suitable and if no such candidates are found suitable for these reserved posts, the High Court selects candidates belonging to other communities for these reserved posts as well. Such unfilled reserved vacancies are, however, carried forward from year to year upto a maximum of five years.

The High Court has not agreed to the orders for reservation of posts at the stage of promotion in the State Judicial Services.

[Letter dated 16th July 1979 of the Registrar, High court of Bombay].

[c] High Court of Calcutta :

In the West Bengal Civil Service (Judicial), 10% and 5% of the vacancies in the said service are being reserved for the candidates belonging to Scheduled Castes and Scheduled Tribes, respectively, at the time of recruitment.

[Letter dated 12th July 1979 of the Registrar, High Court of Calcutta].

[d] High Court of Delhi :

Rule 22 of the Delhi Higher Judicial Services reads as under :

"The reservation of posts for the Scheduled castes and Scheduled Tribes shall be in accordance with the orders issued by the Central Government from time to time".

Rule 28 of the Delhi Judicial Services is as follows :

"Recruitment made to the service by competitive examination shall be subject to orders regarding special representation and other concessions for the Scheduled Castes and Scheduled Tribes and Emergency Commissioned Officers and Short Service Commissioned Officers issued by the Central Government from time to time."

[Letter dated 12th July 1979 of the Assistant Registrar, High Court of Delhi].

[e] The Gauhati High Court ::

Rule 5-A of the Assam Judicial Services Rules, 1967, provides that -

"(1) Of the vacancies to be filled up in Grade III of the Service, there shall be a reservation for candidates belonging to Scheduled Castes, Scheduled Tribes (Plains) and Scheduled Tribes (Hills) not exceeding 7% (seven percent), 10% (ten percent) and 5% (five percent) respectively.

(2) If sufficient number of suitable candidates belonging to Scheduled Castes, Scheduled Tribes (Plains) and Scheduled Tribes (Hill) are not available for filling up the posts reserved for them, these shall be filled up from among other candidates, and an equivalent number of additional vacancies shall be reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes (Plains) and Scheduled Tribes (Hills) for the recruitment.

(3) The Reservation quota of the candidates belonging to Scheduled Castes, Scheduled Tribes (Plains) and Scheduled Tribes (Hills) would be carried forward till the quota is filled up subject, however, to the condition that in no calender year shall the normal reserved candidates and "carried forward" reserved vacancies taken together would exceed 50% of the total number of vacancies filled up."

[Letter dated 11-8-1979 of the Registrar, The Gauhati High Court].

[f] High Court of Himachal Pradesh ::

"The percentage of reservation at the time of selection has to be determined by the Commission according to the ratio fixed by the Government in this behalf from time to time."

[Letter dated 26th July 1979 of the Deputy Registrar (Admn), High Court of Himachal Pradesh].

[g] High Court of Kerala :

The rule is that, out of every 20 vacancies for direct recruitment, 2 vacancies are reserved for appointment of S.Cs. / S.Ts. and reservation is made only for direct recruitment. There is no reservation in the matter of promotion.

[Letter dated 20th July 1979 of the Deputy Registrar in-charge of the High Court of Kerala].

[h] High Court of Karnataka :

Though there no specific provision made in the Karnataka District Judges (Recruitment) Rules, 1962 or the Karnataka Munsiffs (Special Recruitment) Rules, 1978, the provision in the Karnataka Civil Services (General Recruitment) Rules, 1977, according to which, appointments or posts shall be reserved for the members of the SCs / STs, Backward Tribes and Other Backward Classes to such extent and in such manner as may be specified by the State Government under Clause (4) of Article 16 of the Constitution of India. The reservations in respect of Scheduled Castes and Scheduled Tribes for Promotional Vacancies are being made in respect of posts carrying the minimum pay upto and inclusive of Rs.900/- per month only.

[Letter dated 31st July 1979 of the Registrar, High Court of Karnataka].

[i] High Court of Madras :

The Tamil Nadu Public Service Commission recruits the District Munsifs. They follow the rules of reservation as provided in the Rules. Rule 10 of the Tamil Nadu State Judicial Service rules relates to Rule of Reservation which is as follows :

"The unit of selection for appointment shall be 100 of which 18 is reserved for Scheduled Castes and Scheduled Tribes and 31 for backward classes and the remaining 51 shall be filled in on the basis of merit."

So far as the Tamil Nadu state Higher Judicial

Service is concerned, there are 28 permanent posts of District Judges including 9 posts of District Judge Grade I. 10 posts of District and Sessions Judge Grade II is reserved to be filled by direct recruitment. For the District recruitment of 10 posts of District and Sessions Judge Grade II, the Rule of Reservation is applied. For the other posts filled up by promotion from category of Subordinate Judge, there is no Rule of Reservation as the Subordinate Judges are also promoted according to their seniority which in turn follows the rank and seniority fixed by the Service commission by observing the rule of reservation. So the Rule of Reservation is not made applicable for promoting District Judges.

[Letter dated 3rd October 1979 of the Registrar, High Court of Madras].

[j] High Court of Orissa :

The provision has been made in the Judicial Service Recruitment Rules for Scheduled Tribes in the matter of initial recruitment to Class I and Class II posts under the State Judiciary i.e. 16% for the S.Cs. and 24% for the S.Ts. No provision has yet been made so far as the reservation of quota in promotional matters was concerned, and that aspect was under consideration.

[Letter dated 10th February 1979 of the Registrar, High Court of Orissa].

[k] Punjab & Haryana High Court :

There are provisions for reservation for persons belonging to Scheduled Castes and Backward Class under Rule 8A of the Punjab Superior Judicial Service Rules, 1963, which reads as under :

"8-A Notwithstanding anything contained in these rules, the instructions issued by the Government from time to time in relation to reservation of appointments or posts for Scheduled Castes and Backward Classes shall apply for the purpose of making appointments to posts in the service".

"Accordingly, the following percentage has been fixed with effect from 14-6-77 :

(i) For direct recruitment from the Bar	25% SCs. & 5% BCs.	
(ii)For promotion from the Bar.	14% SCs.	2% BCs.

As regards the Haryana Superior Judicial Service, there is no provision for reservation for members

of the Scheduled Castes / Tribes and Backward Classes. But the matter was under consideration. There is provision for reservation for Scheduled Castes / Backward Classes in the Punjab / Haryana Civil Service (Judicial Branch) Rules, 1951, which reads as under :

"Part C 10 (ii) -

Candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab / Haryana Public Service Commission in the list of those who have qualified under rule 8, provided that in the case of candidates belonging to the Scheduled castes / Tribes and Other Backward Classes, Government will have a right to select in order of merit a candidate who has merely qualified under Rule 8, irrespective of the position obtained by him in the examination:

Provided further that the selection of candidates belonging to the Scheduled Castes / Tribes and Other Backward Classes in the order of merit inter se shall be made against the vacancies reserved for them and in the manner prescribed by Government from time to time."

[Letter dated 12-7-1979 of the Registrar, High Court of Punjab & Haryana].

[l] High Court of Judicature at Patna :

Rule 20 of the Bihar Civil Service (Judicial Branch), Recruitment Rules, provides for reservation for Scheduled Castes / Scheduled Tribes candidates at the time of initial recruitment to the Subordinate Judicial Service, but there is no provision in the said rule in the matter of promotion to the Subordinate Judicial Service.

[m] High Court of Rajasthan :

Rule 9 of the Rajasthan Judicial Service Rules, 1955 reads as under :

"Rule 9 of the Rajasthan Judicial Service Rules, 1955, which provides for reservation of vacancies for the candidates belonging to the Scheduled Castes / Scheduled Tribes according to the Government Orders in force at the time of recruitment. Clause 7(3) of the Schedule II attached to the above rule further provides reservation in promotion for the candidates belonging to Scheduled Castes / Scheduled Tribes. This provision has been made effective from 21-3-78."

[Letter dated 29-6-1979 of the Registrar, High Court of Gujarat].

11.1 Admittedly, even in Rule 7 of the Draft Gujarat Judicial Services Rules, 2002, which relates to Recruitment to the Cadre of Civil Judges and lays down the eligibility for selection by direct recruitment, it is contemplated that if the High Court has made any orders under Article 16(4) or 16(4A) of the Constitution providing reservation for Scheduled castes, Scheduled Tribes and Other Backward Classes, the recruitment shall be subject to such orders. We re-produce hereunder the said proviso of the Rule 7 of the Draft Gujarat Judicial Services Rules, 2002, which has been placed on record by the High Court:

"Provided that if the High Court has made any order under Article 16(4) or 16(4-A) of the Constitution providing reservation for Scheduled Castes, Scheduled tribes and Other Backward Classes, the recruitment shall be subject to such order."

11.2 Even in the Indian Administrative Services, there is a provision for reservation for scheduled Castes / Scheduled Tribes. It has been provided under Rule 7(3) of the Indian Administrative Services (Recruitment) Rules, 1954 that appointments to the service shall be subject to orders regarding special representation in the service for Scheduled Castes, Scheduled Tribes and Other Backward Classes issued by the Central Government from time to time in consultation with the State Governments provided that the candidates belonging to Scheduled Castes or Scheduled Tribes or Other Backward Classes, and declared by the Commission to be suitable for appointment to the service, shall be appointed against unreserved vacancies in case they qualify for appointment to the service based on their merits without recourse to the benefit of reservation. The said Rule 7(3) reads as under :

"Appointments to the service shall be subject to orders regarding special representation in the service for Scheduled Castes and Scheduled Tribes and Other Backward Castes issued by the Central Government from time to time in consultation with the State Governments.

Provided that the candidates belonging to the Scheduled Castes or Scheduled Tribes or the Other Backward Classes, and declared by the Commission to be suitable for appointment to the service shall be appointed against unreserved vacancies in case they qualify for appointment to the

service based on their merits without recourse to the benefit of reservation."

12. The deep concern of the framers of the Constitution for the upliftment of the SCs, STs and OBCs is reflected in the elaborate constitutional mechanism set up under Articles 15(4), 16(4), 16(4A), 17, 46, 330, 332, 335, 338, 340 etc. Inspite of this manifest, avowed and determined concern of the Constitution, the objectives have not been fully realized and the matter is viewed from the angle of concessions rather than constitutional obligation to safeguard the interests of the weaker sections of the community by affirmative action to let them overcome the age-old social discrimination suffered by them to enable them to fairly compete for an honourable living. There is always a difference between a bird's point of view and a worm's point of view. The spirit underlying the reservation provisions under the Constitution has to be viewed with a sense of empathy and not mere sympathy. The historical development of reservation in public services roots back to the Poona Pact, an agreement reached on September 24, 1932, which called for "every endeavour" to give Depressed Classes "fair representation" in public services "subject to such educational qualifications as may be laid down". The relevant clause 8 of the Poona Pact which was an "agreement arrived at between the leaders acting on behalf of the Depressed Classes and all the rest of the community..... ", provided as under :

"8. There shall be no disabilities attached to any one on the ground of his being a member of the Depressed Classes in regard to any election to local bodies or appointment to the public services. Every endeavour shall be made to secure a fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services."

13. There are three possible rationales for use of affirmative action underlying the reservation policy for the Scheduled Castes and Scheduled Tribes : (i) It ensures that the institutions do not discriminate against the disadvantaged groups either deliberately or unwittingly. The policy is used as means to achieve the standard liberal objective of non-discrimination and equality of treatment; (ii) The adoption of such reservation policy for the disadvantaged sections of the community that has suffered vicious discrimination denying them access to equal opportunities, would compensate those who have been directly or indirectly

harmed by such past discrimination; (iii) Last, but not the least, the institution would function with greater administrative efficacy, if it is represented by diverse interests of the community. The development of a judiciary reflective of modern societal values as a whole should enable better understanding of court-users of all types, without loss of legal quality.

14. It is clear that the extent to which the composition of judiciary reflects the society which it serves is a confidence issue and has implications for its legitimacy in the eyes of many in the community. If there is a perception that Judges come pre-dominantly from a narrow pool, then there is likely to be a concern that the way in which the law as a whole has developed may have been unduly influenced by one particular set of values. The larger the field from which the members of the judiciary are chosen and the more demonstrable the commitment to equality of opportunity, the greater the confidence that, the best candidates are being appointed. Therefore, while efficacy of administration is a dominant requirement, it should be an accepted objective of whoever is responsible for appointments, to engage in a programme of action to secure the development of a judiciary that reflects diversity of the population by having a balanced composition taking care of the interests of the members of the Scheduled Castes and Scheduled Tribes in consonance with the constitutional scheme as can be achieved consistent with the efficiency of administration. Judiciary should be seen to be impartial and the procedure for appointment of Judges should reflect in its appointments, the composition of a society in general. There should be a positive effort to provide representation to those who have been traditionally excluded because of class distinction.

15. To assume that representation policy adopted under the Constitution for the upliftment of the members of the Scheduled Castes and Scheduled Tribes might become harmful to judiciary and is against maintenance of efficiency of administration is adding insult to injury. The gates that the Constitution has opened for their upliftment cannot be summarily closed on such erroneous basis. Essential qualities for men and women being considered for judicial appointments are integrity, humane qualities of sympathy, generosity, kindness and patience; even tamper; experience in law; intellectual and judgement ability; cultural sensitivity and good manners; which all are not exclusive to any caste or community. The lofty aim of alleviating the sufferings of the underprivileged and exploited sections of Indian

society and transformation of hierarchical society into a modern egalitarian society based on individual achievement and equal opportunity for all, underlying the protective discrimination programme that has been devised under the Constitution, will crumble if the correction process aimed at integration and towards rectification of socially harmful deprivation and injustices is halted under the guise of "efficiency of administration". Though efficiency of public institutions is undoubtedly an important value, the significance of such other values as prevention of discrimination or eradication of stark social injustices cannot be underestimated. The notion of merit itself is subjective and depends upon the value, goal or objective to be achieved. A member of a weaker sections of the community who, for centuries, has been hobbled by chains and liberated cannot just be brought to the starting line of a race and simply told "now you are free to compete with all others", for pretending to believe that one has been completely fair. Equality as a theory is meaningless unless it is realized in reality and as a result. Merit depends upon a number of factors beyond one's control. If uniform conditions of living and development have been denied to the members of Depressed Class, preferring the advantaged over the disadvantaged would be prima facie unjust in so far as it would perpetuate the advancement of the advantaged and condemnation of the disadvantaged. After all, injustice anywhere is a threat to justice everywhere.

16. The stand of the High Court asserted in the affidavit-in-reply of not providing for any reservation in the judicial posts on the ground that, "applying reservation policy might become harmful to judiciary" by referring to Article 335 of the Constitution, would tantamount to an outright rejection of the reservation policy - a stand directly against the expectation of the Apex Court in Bal Mukund's case (supra) that the High Court would also be alive to its social obligations and constitutional guidelines to have the scheme of reservation under Articles 16(4) read with 335 of the Constitutions.

17. The only silver lining visible in the form of the resolution of the Chamber Meeting dated 1-2-1977 by which the resolution of the Chief Justices' Conference held in November 1976 to the effect that the posts should be reserved for Scheduled Castes and Scheduled Tribes in accordance with relevant rules in the State, was adopted has dimmed by the passage of time. It is repeatedly stated before us, that the said resolution is not being observed in practice, even though in the advertisements

inviting applications, there is a mention made of the backlog of the reserved seats. In other words, what has been professed is not practised and the earlier resolve to provide for reservation has remained only on paper.

18. There can be no dispute over the proposition that it will be entirely for the High Court, keeping in view the mandate of Article 335, to consider the claims of the Scheduled Castes and Scheduled Tribes and take its own decision in its collective administrative wisdom as to what should be the ambit and extent of any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in its opinion, is not adequately represented in the judicial services under its control, consistently with the maintenance of efficiency and judicial administration. The policy of reservation was accepted in principle under the said resolution of 1-2-1977 by the High Court and even reiterated thereafter, as reflected in its letter dated 1st February 2003, but it is required to spelt out in concrete terms and to be openly declared in any form that the High Court may choose.

19. As held by the Constitutional Bench of the Supreme Court in Ajit Singh v. State of Punjab, reported in (1997)7 SCC 209, at page 230, in view of the overwhelming authority right from 1963, both Articles 16(4) and 16(4-A), do not confer any fundamental rights nor do they impose any constitutional duties, but are only in the nature of enabling provisions vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted. It was held that, on this aspect, the decisions in Ashok Kumar Gupta (1997)5 SCC 201 and Jagdishlal (1997)6 SCC 538 and the cases, which followed them, do not lay down the correct law. Furthermore, Article 46 of the Constitution contains a directive principle which cannot be enforced in view of provisions of Article 37. Thus, the challenge against the validity of the provisions of the recruitment rules on the ground that they violate Article 16(4) as they do not provide for reservation of SC / ST and OBC in the judicial service fails.

19.1 However, since the claims of Scheduled Castes and Scheduled Tribes to services and posts are required under Article 335 to be taken into consideration (consistently with the maintenance of efficiency) and since the facts placed before us disclosed that though the policy of reservation was accepted by the High Court in principle, as reflected in the resolution of 1-2-1977, it is not

being followed in practice, we, while rejecting the challenge of the petitioner against the impugned recruitment rules, consider it appropriate to direct that the entire issue of reservation of appointments or posts in judicial services be considered and an appropriate decision be taken by the Respondent - High Court keeping in view the concept of social justice underlying the scheme of reservation under Article 16(4) read with Article 335 of the Constitution and Article 46 and in light of the above discussion so that an appropriate reservation scheme can be devised by way of rules under Article 234 or other orders and even by prescribing quota of reservation of posts for direct recruits, if found necessary and feasible by the High Court. Subject to these directions, the petition is rejected. Rule is discharged with no orders as to costs.

[R.K.ABICHANDANI, J.]

[D.H.WAGHELA, J.]

parmar*